

No. 12,356

IN THE
**United States Court of Appeals
For the Ninth Circuit**

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,
vs.
ALFHELD HJALMAR NORDALE and ARNOLD
MAURITZ NORDALE, Co-trustees of the
Nordale Estate Trust,
Appellees.

BRIEF FOR APPELLEES.

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STATEMENT OF CASE.

Facts.

The above entitled cause, which is a suit for ejectment, came on for trial on the merits before the Honorable Harry E. Pratt, District Judge for the Territory of Alaska, Fourth Judicial Division, at Fairbanks, Alaska, sitting without a jury, a jury having been expressly waived by agreement of the parties. On the trial of said cause, the Appellees above named were the plaintiffs and the Appellants above named were the defendants.

The Appellees are the owners in "trust" of the legal title of all of Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, Fairbanks Recording District, Fourth Judicial Division, Territory of Alaska, according to the official plat and survey made by L. S. Robe, C.E., in 1909, and the Appellees and their predecessors in interest have been such owners at all times since May, 1903.

The North boundary of said lot in May, 1903, was the south bank of the Chena River which was also the North boundary of the said Fairbanks Townsite at that time, and the said Chena River still continues to be the North boundary of said lot and also the North boundary of the Townsite of Fairbanks at the present time.

Between 1903 and March 13, 1948, land formed by accretion onto the Appellees' North boundary along the said bank of the Chena River, and the river was pushed northward about two hundred feet; said accretion was formed by a gradual and imperceptible deposit by accretion of silt along said river bank, adjacent to the Appellees' lot during the said period of time, namely, from May, 1903, until March 13, 1948, until a piece of dry land between the side lines of said Lot 6 in Block 4 of the said Townsite of Fairbanks, extended northward between the original North boundary of said lot and the present bank of the Chena River, said dry land being the said accretion, is more particularly described as follows, to wit:

Beginning at Corner No. 1, which is the original Northeast corner of Lot 6, as shown on the official

plat of the Town of Fairbanks, being Plaintiffs' Exhibit "F", thence North $11^{\circ} 16'$ W. 235.15 feet, more or less, to the Chena River, being Corner No. 2; thence downstream along the said Chena River a distance of 143.75 feet, more or less, to Corner No. 3; thence South $11^{\circ} 37'$ East 151.76 feet to Corner No. 4, which is also the original Northwest corner of Lot 6 in Block 4, as shown by the official map of the Townsite of Fairbanks, being Plaintiffs' Exhibit "F", thence in an Easterly direction along the original north boundary of said Lot 6, Block 4, as shown by the official map of the Townsite of Fairbanks, being Plaintiffs' Exhibit "F", a distance of 108.05 feet, more or less, to Corner No. 1, the place of beginning.

The Appellants dug three pits in the accretion above described. One of these pits was directly in front of their building and slightly to the right of the entrance, facing the building, as shown by Appellees' Exhibit "G". This pit was approximately four feet wide, six feet long, and approximately six feet in depth. One of the remaining pits was dug approximately ten feet from the southwest corner of the Waxberg and Birklid building, as shown by Exhibit "G", to the south of the building, which pit was approximately two feet in diameter and about three or four feet deep. The third pit was approximately 20 feet from the southwest corner of the said Waxberg and Birklid building, and was a small trench of about two feet in depth. These pits showed that some tin cans and other debris were mixed in with the accre-

tion as it had built up. The amount of such debris was an infinitesimal per cent of the amount of accretion, and no evidence was produced or testimony given to show that the said debris had had any effect upon the forming of the accretion. The evidence clearly showed that the Appellees and their predecessors in interest had known nothing about the deposit of such debris and that it had been done entirely by third persons.

The official survey of the Townsite of Fairbanks, Alaska, as shown by Exhibit "F", shows that the Fairbanks Townsite was bounded by the Chena River on the East and North sides, and that there is a dotted meander line running from point to point on, or close to the bank of the river, and the lots on said meander line are bounded by the dotted line on that one side and by solid lines on the other three sides.

Appellees' Exhibits "A" and "B", being deeds, expressly show that the said Chena River was, and is, the North boundary of said Lot 6 in Block 4, as extended by the said accretion. The said Chena River was the North boundary of said Lot 6 in Block 4, of the Appellees and their predecessors in interest and continued to be such North boundary at all times mentioned in this case; and that all of such land formed by accretion was above the normal high water mark was asserted by all of the parties to this action and was shown by the levels run by the surveyor, and shown on Appellees' Exhibit "G" and also shown by Appellants' Exhibit 4, a portion of a tree growing upon the river bank near the ground in controversy.

The Appellees, who were the Plaintiffs in the Court below, are co-trustees of the Nordale Estate Trust, by virtue of the terms of a declaration of trust executed on the 4th day of November, 1940, under the terms of which declaration of trust, the Appellees were authorized to bring this suit for the protection of the Trust Estate property, which declaration was filed for record in the Recorder's Office of Fairbanks Recording Precinct on December 12, 1940, in Volume 8 of Miscellaneous Records, at page 450, as Document No. 87740. The Appellees were in possession of all of said Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, and of the said accretion as above described, from on or about the 4th day of November, 1940, down to the 13th day of March, 1948, when the Appellants, on the said latter date, unlawfully entered into possession of a portion of said Lot 6 in Block 4, with accretions, which portion is described as follows:

Beginning at Corner No. 1, which is a point 125 feet North $11^{\circ} 16'$ West of the Southeast Corner of Lot 6, Block 4 of the Townsite of Fairbanks, Alaska; thence South $78^{\circ} 44'$ West, 109.26 to Corner No. 2; thence North $11^{\circ} 37'$ West, approximately 105 feet to the present meander line on the South side of the Chena River, which point is Corner No. 3; thence upstream along the present meander line of the South side of the Chena River to Corner No. 4, which is a point at the intersection of the present South meander line of the Chena River and the East side of Lot Six (6), Block 4 extended; thence South $11^{\circ} 16'$ East to Corner 1 and the point of beginning;

and ousted the Appellees therefrom, and ever since then and now, the said Appellants unlawfully withhold the possession of said portion of Lot 6 in Block 4, as extended by accretions, of the Townsite of Fairbanks, Alaska, from the Appellees.

The Appellees demanded of the Appellants the possession of said premises so unlawfully entered upon by the Appellants, and served notice on the Appellants not to trespass upon said premises, but notwithstanding this, the Appellants have refused to deliver possession thereof to the Appellees, and that the said Appellants still refuse to do so.

That after hearing all of the testimony and the evidence produced at the trial, and after hearing the arguments of counsel, the trial Court rendered a verdict in favor of the Appellees.

Subsequently a motion for new trial was made by the Appellants, which motion was argued by counsel, after which it was denied by the trial Court. Thereafter, the said trial Court entered findings of fact and conclusions of law, which findings of fact contained the foregoing facts, and thereupon the said trial Court entered a judgment in accordance therewith, which judgment ordered, adjudged and decreed that the Appellees, as co-trustees of the Nordale Estate Trust, were declared the owners in trust of the legal title and entitled to possession of all of Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, including the accretions thereto, and likewise ordered, adjudged and decreed that the Plaintiffs have and recover forthwith, of and from the Defendants, and each of them, the

possession of the portion of said Lot 6 in Block 4 now unlawfully held by the Appellants.

It is this judgment upon which this appeal is taken.

ARGUMENT.

I.

The first point which the Appellants have relied on for reversal of the judgment of the District Court is without foundation in fact or in law. The District Court, in its findings, very specifically points out that between 1903 and March 13, 1948, land formed by accretion onto the Appellees' North boundary of Lot 6 in Block 4, along the bank of the Chena River, until the river had pushed northward a considerable distance, and that the said accretion was formed by a gradual and imperceptible deposit by accretion of silt along the river bank adjacent to the Appellees' lot. The trial Court also found that the amount of debris which may have been deposited by third persons was an infinitesimal per cent of the amount of accretion and there was nothing to show that it had had any effect upon the forming of the accretion, and also that the Appellees and their predecessors in interest had known nothing about the deposit of such debris and that it had been done entirely by third persons.

In actions which are tried before a Court, without a jury, the trial Court is entitled to consider all the evidence and to draw therefrom such inferences as are reasonable and proper under the circumstances,

even though another inference, equally reasonable, might also be drawn therefrom. The weight of inferences and of the explanation offered to meet them, is for the determination of the Court, when it is the trier of the facts.

53 *Am. Jur.* 780;

Glowacki v. Northwestern Ohio R. & Power Company (Ohio), 157 NE 21, 53 ALR 1486.

The trial judge, in a trial to the Court without a jury, performs a dual function: he must adopt rules of law for his guidance and find the facts as guided by those rules. He is likewise the judge of the credibility to be given to witnesses who appear before him, and he is not required to accept the testimony of any witness, which he may deem unreliable, although it may be uncontradicted.

53 *Am. Jur.* 780.

It is the contention of the Appellees that the verdict of the trial Court and the findings of fact entered thereon are not contrary to the law and the evidence and are not incredible, but on the other hand, are well supported by the greater weight of the evidence and testimony produced at the trial.

Let us examine the Appellants' contention that their evidence at the trial showed most of the alleged "alluvium" to which the Appellees lay claim, to consist of artificial fill and not to constitute accretion as defined by law.

The only tests made by the Appellants of the character of the soil were demonstrated by three holes

which were dug by them in the area involved. One of these holes was approximately $4\frac{1}{2}$ feet wide, 6 feet long and 6 feet deep, and was dug in front of the building which the appellants had placed on the property in question. The other two holes were dug opposite the southwest corner of the building which the Appellants had placed on the premises, one about 10 feet away from the corner and one about 20 feet away. One of these holes was about 2 feet in diameter and from three to four feet in depth. The other was a narrow trench about 2 feet in depth. The combined area of these holes would probably not exceed forty square feet, and yet there are upwards of fourteen thousand square feet in the entire area now being unlawfully held by the Appellants.

A close examination of Appellants' Exhibits 1, 2 and 3, which are pictures showing the hole dug in front of the Waxberg and Birklid building, and the materials taken from this hole, will show that the most of the material is sedimentary fill as described by the Appellant, Waxberg, in his testimony. (T.R. 231.) As indicated by these pictures, only a small quantity of the material taken from the hole constitutes wood, tin cans, tire rims and an oil drum. This debris is shown to be, and has been, completely surrounded by fine silt or sedimentary fill.

None of the evidence introduced on the trial indicates that any appreciable amount of debris was dumped on the property except in the vicinity of that portion now occupied by the Waxberg and Birklid

building, as shown on the plat introduced in evidence as Appellees' Exhibit "G". So far as the evidence is concerned, all of the remaining portions of the accreted ground were caused by the natural action of the Chena River, both by the migration of the river from the South to the North, and by the subsequent building up of alluvial deposit along the North boundary of said Lot 6 in Block 4 of the Townsite of Fairbanks.

The testimony with respect to the use of this lot goes back as far as 1903 when Carroll and Parker operated a sawmill on the premises. At that time the North boundary of the lot was the Chena River, and the North boundary of the lot has continued to be the Chena River ever since. At that time the lot was 72.85 feet long on the East side and 57.43 feet long on the West side, as shown by Appellees' Exhibit "G". The sawmill mentioned was located on the easterly portion of the lot and occupied most of the lot from North to South. The north end of the sawmill was on the cut bank which extended down to the water line of the Chena River. A steep chute was built from the mill down to the water and extended into the water. The water bordering on the lot and in that vicinity at that time was used as a millpond and there was a natural eddy in the river adjacent to the North boundary of said Lot 6. All of the testimony shows that this eddy began to fill in with silt and sand in 1903 and continued to fill in, forming dry land above the mean high water mark of the Chena River. Fred Parker, Sr., in his testimony testified as follows:

“Q. Did you observe any action of the river on this millpond during time that you operated your sawmill there?

A. We did.

Q. Will you explain what this was?

A. Well, each year the silt kept coming in there and we couldn't hold as many logs as we could the first year.

Q. That silt came in and was deposited by the natural action of the river?

A. Yes sir.

Q. Did you or Mr. Carroll, or anyone else, for that matter, ever dump any dirt or refuse in that millpond?

A. No, sir.” (T.R. 151.)

Mr. Adolph Wehner, who came to Fairbanks, Alaska, in 1905 and has been familiar with the property in question ever since that time, stated in his testimony that the Chena River had changed pretty near altogether and it put all the silt in the area just back of where the sawmill stood and that the Chena River cut away on the North side where the Hospital is, and it filled up on the South side, and that this action of the river had been going on slowly ever since the witness could remember. (T.R. 168 and 169.) Mr. Wehner also testified that since 1905 he had seen a couple of dozen floods that had risen as high as First Avenue and that about six inches of silt had been deposited by every flood and that the flood in the spring of 1948 had deposited about four inches of silt on the playground adjacent to the property in question here. (T.R. 176.)

Mr. Oscar Engstrom testified that he had worked at the sawmill in the year 1904 and that no sawdust or slabs or other debris had ever been dumped into the millpond while he was working there during the fall of 1904. (T. R. 180.)

Mr. Leo Preg, who has been familiar with the property in question ever since 1903, testified that he had worked at the sawmill in 1903 and 1904 and that at no time were any slabs or sawdust ever dumped into the millpond, and that the millpond was kept as clear as possible, and that from the start, the pond was $3\frac{1}{2}$ to 4 feet deep, but it gradually began to fill up with silt that was coming down the river, and that finally it had filled up in 1904 to the point where there was only a foot of water left and the big logs had to be rolled over the muck. (T.R. 188 and 189.) Mr. Preg, who has lived in Fairbanks since 1903, and has spent most of his time here and is thoroughly familiar with the action of the Chena River, forming the North boundary of said Lot 6, further testified that over a period of years, the river had gradually moved from South to North and that the North boundary of Lot 6 had extended by accretions and the action of the river, and nothing else. (T.R. 190.) Mr. Preg further testified that in 1915 the waterfront shown in Appellees' Exhibit "I", correctly described the area and he further stated that the pipe line which appears to be running down to the Chena River along the East line of the property in question, as shown by Appellees' Exhibit "I", had to be extended further down into the water every year and added onto because the South bank of

the Chena River at that point was continually building up and had been since 1903. (T.R. 190, 191 and 192.)

Mr. Waxberg, one of the Appellants, when describing certain materials appearing on Appellants' Exhibit No. 3, said that he thought part of the material was, more or less, a sedimentary deposit, and continued to say over the objection of the Appellees, "*I would say it is almost all sedimentary fill.* However, there is good sized rocks in there that anyone would definitely know couldn't have been floated in there, *and in along with this sedimentary fill,* why, we also found boards and logs and pieces of tin and what have you." (Italics ours.) (T.R. 231.)

Mr. Richard Ragle testified for the Appellants and stated definitely that the channel of the Chena River at the point in question had tended to migrate from South to North. (T.R. 246.) Mr. Ragle further testified that Appellants' Exhibit No. 4 was a section taken from a sapling which he found growing on a little cut bank on the present channel, on property adjacent to the extention of Lot 6 in question here, and that this sapling showed an age of not less than twelve years. (T.R. 252.)

Mr. Richard Rothenberg, who has been a resident of Fairbanks, Alaska, since 1903, and who has been acquainted with the property in question ever since that time, testified for the Appellants and stated positively that the eddy in back of Parker's sawmill was gradually filled in by silt and that the channel moved

out from where the eddy used to be and that this movement had been gradual. He also testified that he noticed that the current was changing and that the channel was moving to the North. (T.R. 273 and 274.)

Mr. Albert Norlin testified for the Appellants and stated that he had worked in a hotel that was located near the property in question from 1920 to 1925, and he stated that the lot in question in this case had filled in some with silt from the river, brought in by the high water, and he stated that the land behind the Vachon building, which sets on the lot in question, was dry except when the water was extremely high and that he had never thrown any refuse on the lot in question. (T.R. 278, 279, 281 and 282.)

Mr. Dave Stanford, who testified for the Appellants, stated that he had lived in Fairbanks since 1911 and has been acquainted with the property since that time. He stated that he had worked for a man by the name of Kehoe, who was in the business of hauling garbage, and that they had dumped garbage occasionally on the property in question during the period of about two or three years. He stated that at no time did they ever dump any garbage in the water. They always dumped it on dry land, above the normal water level of the Chena River. In fact, he stated that when the water was high, they did not dump there at all. (T.R. 288, 289.)

Mr. Charles Main testified for the Appellants and stated that he had resided in Fairbanks since 1904 and that he has been familiar with the property in

question ever since that time. He stated that he remembered the big eddy in back of the Carroll and Parker sawmill which was located on the lot in question in this suit, and that he had seen this eddy fill up with silt, and that it did not take long in high water to make a big silt and that it was settling all the time and filling up the eddy. He stated that he had seen some garbage or refuse dumped on the land back of the Vachon building, being the property in question, but that it was always dumped on dry land. (T.R. 292, 294.)

Mr. Alfheld Hjalmar Nordale, one of the Appellees, who has been familiar with this property for the past 44 years, testified that the Chena River has been cutting away on the North bank of what would be the South boundary of Slaterville, so that where a chicken house and greenhouse formerly stood on the North bank of the river, the channel has now moved over and taken away the ground on which the chicken houses and greenhouses formerly stood. At the same time, the South bank of the Chena River, being the North boundary of the lot in question, has been slowly building up during all of these years. (T.R. 93, 94.) He further testified that the movement of the channel of the river has combined with flood waters in building up the accretions to Lot 6, and that with each flood stage, the receding water would leave a deposit of alluvial soil on the property in question, which has assisted in building up the accretions over the period of years. (T.R. 95, 96.)

The Appellants contend in their Brief that the trial Court failed to take into consideration the Appellants' evidence that the land in question was not an accretion but was formed by "the deposit of waste and debris on the shore." (Page 3 of Appellants' Brief.) It seems to us that here the Appellants beg the question, because if the waste and debris were deposited "on the shore", it would mean that the deposit was being made on land already above the mean high water mark of the Chena River, and therefore it would be on land already formed by accretions. In any event, in a trial by the Court, without a jury, there is a presumption that incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only.

3 Am. Jur. 593;

McCaskill Company v. United States (216 U.S. 504).

It must be pointed out, and the Appellants concede, that at least twenty feet had been accreted to the North boundary of Lot 6 by the time the Vachon building was constructed sometime in 1908 or 1909. Appellants say on page 7 of their Brief, "It is only fair to assume that a useable or occupiable portion of that accretion had formed by 1922." If this be true, and certainly the evidence substantiates it, then the rest of the accretion would belong to the upland or riparian owner just as well as the first 20 feet beyond the original North boundary of said Lot 6. It cannot be argued in one breath that part of the accretions which are admitted could belong to the upland owner,

being the Appellees, and not the rest of the accretion, since the entire process of building up has been one of imperceptible growth over a period of more than 45 years.

The fact is that all of the testimony shows that such debris and refuse as was deposited on the property in question was put there after the land was formed and above the mean high water mark of the Chena River. Not a single witness testified that he had dumped any debris there while the ground was under water. Consequently, none of the debris could possibly have affected the accretion, and even assuming, for the sake of argument, that the refuse may have assisted in the further accumulation of dry land above the mean high water mark of the Chena River, this does not constitute new accretion or artificial fill because at no time was any debris dumped into the water.

Counsel make considerable effort to distinguish between artificial causation and artificial fill, and they cite the case of *County of St. Clair v. Lovingston*, 90 U.S. 46, as showing that there is a difference. However, they fail to point out that in the Lovingston case, the dikes which were built to some extent may have caused some of the accretions, but it can be argued with equal force that the tire rims, oil barrel and other articles of debris found in the hole dug by the Appellants on the land in question in this case, could also have assisted in the building up of alluvial soil by causing some flow of water in and around these obstacles, but the principle is exactly the same. In both instances, they would be merely artificial causa-

tion, because by no stretch of the imagination can it be said that the debris alleged to have been dumped on the Appellees' lot was, in any sense of the word, a complete fill, since their own testimony and evidence shows clearly that the largest portion of material taken from these holes was sedimentary fill. As the Supreme Court said in the *Lovingston* case:

“The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of water was natural or affected by artificial means is immaterial. * * * Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats or not. * * * The question is well settled at common law that the persons whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain. * * * Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. * * * If there be a gradual loss, he must bear it; if a gradual gain, it is his.” (*County of St. Clair v. Lovingston*, 90 U.S., page 46, pages 66, 67, 68 and 69.)

By Act approved June 6, 1900, Congress, in making laws for the government of Alaska, provided that "So much of the common law as is applicable to and not inconsistent with the Constitution of the United States, or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska". 31 Stat. 552, Sec. 367; Sec. 2-1-2, Alaska Compiled Laws Annotated, 1949. This section was amended in 1933 subjecting the common law to acts passed by the Territorial Legislature, but otherwise it remains unchanged today.

The great weight of authority is that the law respecting the acquisition of title by accretion is independent of the law respecting the title to soil covered by water. *Shively v. Bowlby*, 152 U.S. 35.

At common law the riparian owner acquires title to additions thereto by accretion. *Oklahoma v. Texas*, 268 U.S. 252-256; 56 Am. Jur. 892, Note 18; page 901, Sec. 490; page 895, Note 20.

Even if Appellants had shown that debris had been deposited artificially in such quantities as to increase the deposit by accretion, it would nevertheless have been immaterial as the riparian owners had no part in making the artificial deposits.

St. Clair County v. Lovingston, 23 Wallace 46-66;

Jackson v. U.S. (C.C.A. 9th), 56 Fed. (2d) 340; *Forgeus v. Santa Cruz County* (Cal.) 140 Pac. 1092;

Adams v. Roberson (Kans.), 155 Pac. 22;

Tatum v. St. Louis (Mo.), 28 S.W. 1002;
Frank v. Smith (Neb.), 393 N.W. 329; 134
A.L.R. 458-468;
Re Neptune Avenue (N.Y.), 262 N.Y.S. 679;
Re Hutchinson River Parkway Extension, 14
N.Y.S. (2d) 692. Affirmed 33 N.E. (2d) 252;
State v. Lakefront, etc. (Ohio), 27 N.E. (2d)
485;
Gillihan v. Cieleha (Or.), 145 Pac. 1061;
Morgan v. Jamestown (R.I.), 80 Atl. 271;
Memphis v. Waite (Tenn.), 52 S.W. 161;
56 Am. Jur., page 899, Note 15e; page 894,
Note 1.

The Appellants do not admit that the South bank of the Chena River was the boundary of the Townsite of Fairbanks, and of Appellees' lot, afterwards shown by the Official Survey of L. S. Robe in 1909, and the plat thereof, to be Lot 6 in Block 4 of the Fairbanks Townsite, Alaska. This map, Appellees' Exhibit "F", shows the Fairbanks Townsite to be bounded by the Chena River on the East and North sides. There is a dotted meander line running from point to point on or close to the bank of the river, and the lots on said meander line are bounded by the dotted line on that one side, and solid lines on the other three sides.

The rule is quoted from 7 Wall. 287 in *Shively v. Bowlby*, 152 U.S. 39:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the

banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the watercourse, and not the meander line as actually run on the land, is the boundary."

In *Whitaker v. McBride*, 197 U.S. 510-512, it is stated:

"A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser."

To the same effect are:

8 *Am. Jur.* 76;

11 *C.J.S.* 573, Note 79.

The water and not the meander line is the boundary. *Herne v. Smith*, 159 U.S. 40, 42, in which the Court said:

"The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line, * * *".

In *Mitchell v. Smale*, 140 U.S. 406, the Court held, as to a non-navigable lake, page 414:

"It has been decided again and again that the meander line is not a boundary, but that the body

of water whose margin is meandered is the true boundary."

In *Hilt v. Webber*, 233 N.W. 159; 31 A.L.R. 1238, it was held that the boundary line of riparian owners along the Great Lakes is the waters' edge, and not the meander line. The riparian owner has the right to accretion.

In order to effect a change of boundary, formations resulting from accretion or reliction must not only be made to the contiguous land, but must operate to produce an expansion of the shore line outward from the tract to which they adhere. One of the prime requisites of an alluvial formation or deposit, in order to give title thereto to the owner of the land to which it is attached, is that it be made gradually and imperceptibly. The word imperceptibly as used in this rule means the accretion is imperceptible in its progress, although it may be perceptible after a long lapse of time. As stated in some cases, the test as to what is gradual and imperceptible in the sense of the rule is that although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. According to some authorities, it is not necessary that the formation be one in discernment by comparison at two distinct points of time, but it has been said that the length of time during formation is not material if the increment added is utterly beyond the power of identification.

58 *Am. Jur.* 897 and 898.

That the area of riparian property has more than doubled in extent by accretions made during more than

40 years is not so great an increase as to forbid the idea that it was imperceptible.

58 *Am. Jur.* 898;

Note 2, Anno. 58 *L.R.A.* 194.

Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. The term "alluvion" is applied to the deposit itself, while accretion denotes the act; however, the terms are frequently used synonymously.

56 *Am. Jur.* 891.

It is a general rule that where the location of the margin or bed of a stream or other body of water which constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of riparian land thus acquires title to all additions thereto or extensions thereof by such means and in such manner and loses title to such portions as are so worn or washed away or encroached upon by water.

56 *Am. Jur.* 892;

Oklahoma v. Texas, 268 U.S. 252;

Ark. v. Tenn., 246 U.S. 158.

Appellants admit that the action of the Chena River deposited silt along the shore lying in front of the Appellees' land, but they argue that this deposit has been considerably accelerated by the use of the shores

as a dump yard. (Page 4 of Appellants' Brief.) There is no evidence to indicate this or to support this argument. However, even if there were such evidence, it would not change the rule as announced in *County of St. Clair v. Lovingston*, *supra*.

There is no testimony supporting the statement that the hole dug by the Appellants in front of their building was well below the original mean high water level of the Chena River. The levels taken by the witness, Linck, indicate that there was a gradual slope from the South end of the lot to the river and that the sapling which was found in the vicinity of the property in question by the witness, Ragle, and from which Appellants' Exhibit 4 was taken, was growing 12 feet above the low water mark and on about the high water mark, making it at least 6 feet above the mean high water mark of the Chena River. (T.R. 253.) This point is well below the bottom of the hole dug by the Appellants.

The Appellants argue that the witness, Ragle's, testimony shows that the material found in the test pits was not deposited by any natural agency and yet the witness, Ragle, positively testified that the Chena River had migrated from South to North (T.R. 246), causing dry land to appear by natural action of the river, and all of the debris found in the test pits referred to was deposited on the land after it had become dry and above the mean high water mark of the Chena River.

The Appellants argue that the Appellees are not entitled to the accretion because they have failed to im-

prove it. There might be some force to this argument if the basis for the Appellees' claim was laid on the theory of adverse possession. However, this rule is not applicable since the Appellees' claim is based entirely on the law of accretion and as that of a riparian owner, and as such, it is not incumbent on the Appellees to maintain or improve their land in any way whatsoever. Being the owners of the fee simple title to the accretion, Appellees may use the land as they see fit and improve it or not, as they see fit.

The Appellants also answer their own argument by admitting on page 7 of their Brief that a usable or occupiable portion of the accretion had formed by 1922 and had been occupied by a building built on the premises and known as the Vachon building ever since 1908 or 1909, so that if the Appellees were attempting to assert their title on the basis of adverse possession, they would be without authority because adverse possession would not hold against the United States Government; but by reason of the fact that the Appellants admit that the Appellees are entitled to the accretions of more than 20 feet beyond the original North boundary of the lot, they cannot now be heard to argue that the title to the remaining portion of the accretions vests in the Federal Government. Furthermore, this question is not within the issues raised by the pleadings.

Appellants seem to think that there was some uncertainty in the mind of the trial Court in his findings of fact. However, an examination of these findings discloses no uncertainty whatsoever, and an examination

of the record amply discloses that the findings of fact were justified by an overwhelming preponderance of evidence.

The Appellants concede that the Appellees had no knowledge of the deposits of the debris on the premises. Appellants further concede that these deposits were made entirely by third persons. However, they do not seem to agree with the law applicable to such cases, notwithstanding the fact that many courts from the United States Supreme Court on down have held that if the artificial fill is made by third persons or trespassers, the law of accretions still holds and the riparian owner is entitled to the same.

Many of the cases cited in Appellants' Brief are not particularly applicable since they apply to instances where land was reclaimed by man through filling in land once water and making it dry, and filling up land under navigable water and thereby raising it above water, thus making it dry. These instances do not apply to the case at bar for the simple reason that all of the testimony shows that all of the debris dumped on the land in question was never dumped into the water but was always dumped on dry land, leaving it definite and certain that the accretion had formed prior to the time when the debris had been dumped upon the land and consequently could have had no effect whatever on the original formation of the accretions and only may have enhanced the continued building up of the dry land.

It may be beyond the Appellants' discernment to conceive how the upland owners factual unawareness

can convert artificial fill into accretion were such the case, but the lack of discernment on the part of the Appellants cannot change the law or the evidence, and whether or not a state of mind can encourage civic beautification is a question which might better be taken up with the mayor and the city council and not with this court.

The Appellants state on page 13 of their Brief that the title to the Chena River bed to high water mark must be assumed to be in the United States Government. There is no basis in law or in fact for this statement and it is difficult to understand upon what theory the Appellants endeavor to make such a claim. The Appellants further argue that the interest of the United States Government is presented by the record and quote certain portions of the record in a futile attempt to substantiate this position, but this is entirely outside the record and the law. The location notice referred to is not in evidence and was not part of the issues joined, and furthermore, the Appellees' right to the accretions is not based upon adverse possession as has been pointed out previously. They are based upon title in fee simple under the general law of accretions, the riparian right to future alluvion being a vested right. (*County of St. Clair v. Lovingston*, *supra*.)

The argument set forth on page 15 of Appellants' Brief with regard to accessibility to the waterfront does not make sense because the upland owners, the Appellees, have always had accessibility to the Chena

River by reason of owning the fee simple title to the accretions as well as to the original portion of Lot 6.

The inescapable conclusion so far as the first point of the Appellants' Brief is concerned is they have wholly failed to advance any substantiating theory or proof that is sufficient to disturb the findings of fact or the judgment as entered by the trial Court.

II.

The second point relied upon for reversal by the Appellants is equally without merit. They attempt to argue that the Appellees have not sustained the burden of proof that the disputed land was formed by accretions as defined by law. All of the evidence quoted above and the entire record substantiates this without question, and for the Appellants to argue that an examination of the Appellees' evidence, giving it its full weight, reveals that it fell short of sustaining the burden of proof is merely wishful thinking on the part of the Appellants. They go on to state on page 18 of their Brief that the Appellees' first witness, A. H. Nordale, testified that the upland was flooded once or twice a year, leaving some alluvial deposit and that over a period of years the disputed premises were building up, but they point out that Mr. Nordale did not say how much alluvial deposit was left after each flood. However, the witness, Wehner, did testify on cross examination as to how much deposit was left after each flood and showed that over the period of

years that he has known the property, on the basis of his estimates, more than twelve feet of alluvial deposit has built up since 1905. (T.R. 176.)

Appellants further argue that the testimony of the witness, Fred Parker, Sr., must be considered largely a conclusion; however, they fail to point out his testimony was not shaken on cross examination, and there has been no testimony introduced contradicting him in any way, and more than 20 feet of accretion had been added to the lot by the time the Vachon building was constructed, showing clearly that Parker's testimony was fact and not fiction.

On page 20 the Appellants argue that the fact that the premises were built up by the deposit of silt is largely a conclusion. It might equally be argued that it is as much of a conclusion to assume that the land was built up by artificial means, because all of the testimony shows that the debris which was dumped on the premises was dumped on dry land, whereas the filling in of the millpond began as far back as 1903 and the gradual and imperceptible accretion continued from year to year since, and still continues, as shown by the evidence that in the flood of 1948 two and one half inches of sedimentary deposit was found on a concrete foundation of the Waxberg-Birklid building by the photographer, Griffin, who took the four pictures introduced in evidence by the Appellees as Exhibits "J", "K", "L" and "M", showing the flood conditions at that time. The Appellants attempted to discredit this testimony by showing that there was little or no sedimentary deposit when they examined

the premises the next year. However, they failed to point out that during the winter the ground had been covered with a large amount of snow which had melted in the spring and drained off, which could account for the fact that there was no evidence of sedimentary deposit left by the flood of 1948 at that time. However, the pictures introduced in evidence by the Appellees definitely contradict the Appellants' story.

They make much ado about the fact that only one quarter inch of sedimentary deposit was left on the floor of their building after the flood of 1948. However, it should be pointed out that the building only had sixteen inches of water in it and that it was much higher than the surface of the ground and naturally, when the water receded, only a small portion of the sedimentary residue would be left in the building.

It is difficult to see how any more could be produced by way of proof than is disclosed by the record substantiating the fact that the accretions to the Appellees' land were formed by the natural action of the Chena River over a period of more than 45 years. If the testimony as disclosed by the record is not sufficient to establish this fact, then by no stretch of the imagination could a case of this kind ever be proved.

CONCLUSION.

The Appellees respectfully submit that the entire argument of the Appellants is a futile attempt to pull the cerulean veil across the eyes of this court. However, we feel sure that this court will view the evidence and law in this case through the clear vision of logic and the bright eye of reason, and by so doing, will reach the inescapable conclusion that the trial court was entirely correct in its findings and that the accretions formed on the North boundary of Lot Number 6 in Block Number 4 of the Townsite of Fairbanks was the result of the gradual deposit, by the water of the Chena River, of solid material, consisting of mud, sand and sediment, so as to cause that to become dry land which was theretofore covered by water, and that the boundary of the original Lot 6 of Block 4 was gradually and imperceptibly changed by the said accretion and that, therefore, the Appellees, as owners of the riparian land, have thus acquired title to all the additions thereto, and that the Appellants are trespassers thereon and unlawfully withhold the said accretions from the Appellees, by reason of which the Judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, entered in this cause should be affirmed.

Dated, Fairbanks, Alaska,

February 17, 1950.

Respectfully submitted,

MAURICE T. JOHNSON,

Attorney for Appellees.

